

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CRYSTAL CONSERVATION COALITION,)	No. CV6-1770 RSL
)	
Plaintiff,)	
)	PLAINTIFF'S MOTION TO REOPEN
v.)	PROCEEDINGS AND TO SET
)	SCHEDULING CONFERENCE
CRYSTAL MOUNTAIN, INC.,)	
)	
Defendant.)	
)	

Defendant Crystal Mountain, Inc. ("CMI") has violated numerous requirements of the Modified Consent Decree entered by this Court on January 27, 2013. The violations include missing the deadline to install crucial water quality protection infrastructure by over three years. Proving the full extent of violations will require discovery and either summary judgment proceedings or trial. Plaintiff Crystal Conservation Coalition ("CCC") therefore moves the Court to issue an order that reopens proceedings in the above-captioned matter and sets a scheduling conference. Once a scheduling conference date is set, the parties can confer and develop a proposed schedule pursuant to Federal Rule of Civil Procedure 26(f).

BACKGROUND

Defendant CMI owns and operates Crystal Mountain Ski Resort, a major year-round resort located in Pierce County, Washington, west of Mount Rainier National Park, on land owned and managed by the United States Forest Service. Plaintiff CCC is a non-profit corporation organized under the laws of Washington State that is dedicated to monitoring the impacts of private development on public lands comprising and surrounding the Crystal Mountain Ski Resort and advocating for environmental protection of these lands and related natural resources.

The Crystal Mountain Ski Resort functions as a small municipality, with many seasonal residences on site in addition to restaurants, hotels, and parking lots. CMI generates significant wastewater and stormwater. CMI operates the resort under a Master Development Plan approved by the U.S. Forest Service. To comply with the requirements of the National Environmental Policy Act ("NEPA"), the Forest Service prepared a Final Environmental Impact Statement ("FEIS") analyzing the environmental impacts caused by the operation of Crystal Mountain Ski Resort. The FEIS sets forth extensive mitigation that CMI promised to carry out in order to reduce and offset the impact of operating a major recreational facility in an otherwise pristine area. CMI has failed to carry out much of the promised mitigation. Some of CMI's failures gave rise to violations of the Clean Water Act.

Starting in approximately 1998, CMI was aware that wastewater discharges from CMI-owned facilities in the Crystal Mountain Ski Resort base area were not being adequately treated prior to discharge into Silver Creek, which runs through and adjacent to the Crystal Mountain Ski Resort. On December 12, 2006, CCC sued CMI for violations of the Federal Clean Water Act relating to CMI's discharges of wastewater into Silver Creek. ECF No. 1. As a result of the

lawsuit, CMI and CCC entered into a Consent Decree, which this Court approved on February 20, 2007. ECF No. 10.

The 2007 Consent Decree required CMI to design and build a “state of the art” wastewater treatment plant (“WWTP”) to treat discharges from CMI-owned facilities in the Crystal Mountain Ski Resort base area by October 31, 2011, and required CMI to engage in mitigation projects to improve water quality in Silver Creek. CMI missed the relevant deadlines by over a year, at which point the parties entered further negotiations. The parties agreed to a modified consent decree, which this Court entered on January 27, 2013.

The Modified Consent Decree, ECF No. 16, established new deadlines for installation of a modified WWTP. It also requires CMI to connect new and existing facilities to the WWTP (§ 9.c.), to conduct water quality monitoring in Silver Creek (§ 9.d.), and to complete riparian restoration projects (§ 10.h.).

Most significantly for these proceedings, the Modified Consent Decree added detailed requirements for the development of a robust stormwater management plan and construction of a stormwater management system in parking lots associated with CMI facilities (§ 10.f.). A stormwater management system helps to reduce and clean runoff from parking lots and surrounding areas that drain into parking lots. The Modified Consent Decree sets forth detailed requirements for the stormwater management plan, and states that CCC may have an expert review the plan and make recommendations (§ 10.g.). CMI’s failure to adhere to the recommendations creates a rebuttable presumption of non-compliance with the terms of the Modified Consent Decree (§ 10.g.).

CMI developed a draft stormwater management plan and CCC hired an expert to review. The expert, Dr. Richard Horner, made several recommendations. CMI never formally responded

1 to those recommendations or provided CCC with a final stormwater management plan. The
2 deadline for implementation of the final stormwater management plan was October 31, 2013 (§
3 10.g.). It appears that CMI has implemented a stormwater system in a small fraction of the
4 areas where a stormwater system is required by the Modified Consent Decree.

5 The Modified Consent Decree also requires CMI to provide CCC with regular water
6 quality monitoring data and regular updates on the status of implementation of the stormwater
7 management plan (§ 10.i.). CMI has repeatedly missed its deadlines to provide water quality
8 data, and has only provided such data after repeated reminders. In addition, CMI has failed to
9 provide CCC with the required updates on the status of implementation of the stormwater system
10 required by the Modified Consent Decree (§ 10.i.1).

11 CMI has a long history of water quality compliance failures, extending beyond violation
12 of the Consent Decree and Modified Consent Decree. Permit reporting available at the
13 Department of Ecology's website indicates that from 1988 to 2017, Crystal Mountain has
14 violated wastewater permit requirements 281 times. *See* Declaration of Wyatt Golding, Exh. A.

15 CCC has repeatedly proactively engaged with CMI, through legal counsel, in efforts to
16 obtain compliance. CMI has repeatedly delayed and obfuscated, failing to provide basic
17 information about progress toward deadlines in the decree.

18 In the latest attempt to gain compliance with the decree, CCC wrote CMI a letter on
19 December 12, 2016 describing violations of the Modified Consent Decree, seeking water quality
20 monitoring data, and requesting an update on the status of the stormwater management system.
21 *See* Golding Decl., Exh. B. CCC informed CMI that it considered the letter to invoke "dispute
22 resolution," as referenced in the Modified Consent Decree. Counsel for CMI first responded on
23 December 23, 2016, requesting a delay of two weeks to provide information. Over the course of

1 the following two months, counsel for CCC repeatedly sought to obtain a full update on the
 2 status of stormwater implementation. Finally, on February 13, 2017, CMI provided the
 3 requested information. On March 17, 2017, CCC sent CMI a settlement offer and requested a
 4 response by April 1, 2017. *See* Golding Declaration, Exh. C. CMI requested an extension to
 5 April 7, 2017, and then offered to conduct further negotiations in two weeks' time but failed to
 6 provide a counter-offer or other substantive response.

7 Over three years have passed since the Modified Consent Decree's deadline for CMI to
 8 complete a stormwater system that conforms to the requirements of the Modified Consent
 9 Decree. Nearly four months after CCC's initial request for dispute resolution, violations of the
 10 Modified Consent Decree are ongoing. While CMI has offered to conduct further negotiations,
 11 CCC has determined based on CMI's long history of non-compliance with the Clean Water Act,
 12 State law, and court orders that such negotiations would only accomplish further delay.
 13 Plaintiff's good faith attempts at dispute resolution have failed, and the only viable path forward
 14 is reinitiation of proceedings.

15 ARGUMENT

16 This Court retains jurisdiction to enforce the Modified Consent Decree (Modified
 17 Consent Decree ¶ 12), and has "broad discretion to fashion equitable relief in order to enforce the
 18 provisions of the consent decree, over which it retains jurisdiction" *United States v. City*
 19 *and County of San Francisco*, 699 F. Supp. 762, 766 (N.D. Cal. 1988).

20 Plaintiff seeks to reopen proceedings to enforce the Modified Consent Decree. Plaintiff
 21 has fulfilled the prerequisite for judicial enforcement set forth in the Decree—Plaintiff sought to
 22 informally resolve disagreements with CMI in a series of letters and phone calls, and more than
 23 two weeks has passed (Modified Consent Decree ¶ 12).

1 The case should proceed in a manner similar to a contract dispute. *See e.g., Nehmer v.*
2 *United States Dep't of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007) (citations omitted).
3 As a general matter the enforcing party bears the burden of proof to demonstrate, by a
4 preponderance of evidence, that a violation has occurred. Here, for some of the alleged
5 violations Plaintiff bears the burden of proof. For other violations, the Modified Consent Decree
6 creates a rebuttable presumption of a violation in certain factual circumstances and CMI will
7 bear the burden to prove violations did not occur. To address the compliance issues in an orderly
8 fashion, CCC believes that it is necessary for the Court to set a status conference and appropriate
9 deadlines.

10 Federal Rule of Civil Procedure 16 provides the correct framework for implementing
11 efficient proceedings. As described in Fed. R. Civ. P. 16(a) and 16(c), a scheduling conference
12 would facilitate expedited disposition of a well-managed trial. Prior to a scheduling conference
13 and issuance of a scheduling order, the parties must confer pursuant to Fed. R. Civ. P. 26(f).
14 Once this Court sets a scheduling order, Plaintiff will commence discovery. Given that CMI has
15 failed to implement entire portions of the required stormwater plan, it is likely that some or all of
16 the dispute will be amenable to summary judgment based on responses to requests for admission
17 and interrogatories.

18 Plaintiff initiated these proceedings in 2006, and over a decade later CMI has yet to fully
19 comply with this Court's orders. Federal Rules of Civil Procedure 16 and 26 provide the correct
20 means of enabling prompt and thorough resolution on CMI's ongoing non-compliance. Plaintiff
21 respectfully requests that this Court reopen proceedings and set a scheduling conference.

22 RELIEF REQUESTED

23 For the foregoing reasons, CCC respectfully asks the Court to:

- 1) Order the parties to appear at a scheduling conference at the Court's soonest available date;
- 2) Order the parties to develop a discovery plan pursuant to Fed. R. of Civ. P. 26(f) and to file that plan with this Court prior to the scheduling conference; and
- 3) Notify the parties that following the completion of the scheduling conference, the Court will issue a scheduling order as soon as practicable.

Respectfully submitted this 12 day of April, 2017.

ZIONTZ CHESTNUT



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